

United States
Court of Appeals
for the Ninth Circuit

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Territory of Hawaii

FILED

APR 29 1949

PAUL P. O'BRIEN,

United States
Court of Appeals
for the Ninth Circuit

VICTOR J. VEATCH,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Bond for Costs on.....	12
Certificate of Clerk to Transcript of Record on	16
Designation of Record on (DC).....	15
Notice of	12
Statement of Points on (DC).....	16
Statement of Points and Designation of Record on (USCA)	18
Bond for Costs on Appeal.....	12
Certificate of Clerk to Statement.....	3
Certificate of Clerk to Transcript of Record on Appeal	16
Clerk's Statement	2
Complaint	3
Decree Dismissing Complaint.....	11
Designation of Record on Appeal (DC).....	15
Designation of Record, Statement of Points and (USCA)	18
Motion to Dismiss.....	9
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	12
Statement of Points on Appeal (DC).....	16
Statement of Points on Appeal (USCA).....	19
Summons	8

NAMES AND ADDRESSES OF ATTORNEYS

For the Plaintiff,

VICTOR J. VEATCH,
HYMAN M. GREENSTEIN,
501 Merchandise Mart Bldg.,
Honolulu, T. H.

For the Defendant,

WILLIAM BORTHWICK,
SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Bishop Trust Bldg.,
Honolulu, T. H. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
District of Hawaii

Civil No. 871

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

CLERK'S STATEMENT

Time of Commencing Suit: September 4, 1948.
Complaint filed.

Names of Original Parties: Victor J. Veatch,
Plaintiff; William Borthwick, Defendant.

Dates of Filing Pleadings: December 20, 1948. Mo-
tion to Dismiss and Citations in Support Thereof.
January 11, 1949, Decree Dismissing Complaint.

Proceedings in the above-entitled matter were had
before the Honorable J. Frank McLaughlin, Judge,
United States District Court, District of Hawaii.

Dates of Filing Appeal Documents:

January 14, 1949: Notice of Appeal, Bond for
Costs on Appeal.

January 17, 1949: Designation of Record and
Statement of Points on Appeal. [3]

CERTIFICATE OF CLERK TO THE
ABOVE STATEMENT

United States of America,
Territory of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause, the names of the original parties, the dates when the respective pleadings were filed and the name of the judge presiding, and the dates when appeal pleadings were filed in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February, 1949.

/s/ WM. F. THOMPSON, JR.

Clerk, United States District
Court, District of Hawaii. [4]

[Title of District Court and Cause.]

COMPLAINT

To the Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

Comes now Victor J. Veatch, plaintiff above named, by Hyman M. Greenstein, his attorney, and complaining of the defendant above named respectfully represents to this Honorable Court as follows:

1. That plaintiff is a citizen of the State of Colo-

rado, temporarily residing and working on Hickman Field, a military reservation of the United States.

2. That William Borthwick, Defendant, is a citizen of the Territory of Hawaii, and at all times complained of herein was, and still is the Tax Commissioner of the Territory of Hawaii; but that said defendant is not sued herein in such official capacity but simply in his individual capacity.

3. That the amount in controversy exceeds \$3,000.00, exclusive of interest and costs; and that this suit is filed under Section 1332 of Title 28, United States Code, Judiciary and Judicial Procedure (Public Law 773, Laws of the 80th Congress, Second Session). [6]

4. That the plaintiff herein is defendant in a certain case pending in the Courts of the Territory of Hawaii wherein the constitutionality of the 2% Compensation and Dividends Tax Law is involved.

5. That an appeal in said case is presently being perfected to the United States Circuit Court of Appeal for the Ninth Circuit; but that during the pendency of said case and until its final disposition, plaintiff and hundreds of persons similarly situated have been engaged in paying various tax moneys into a special escrow or protest fund with said defendant and his agents and employees until the final disposition of said case.

6. That in order to expedite such protest payments, the plaintiff has been bringing in various moneys and signed returns and appeal forms on behalf of various other taxpayers, similarly situated as himself, being duly authorized thereunto by said

other taxpayers, into the office of the said tax Commissioner, making such visits and payments about once a week.

7. That plaintiff is a good, true, honest, just and faithful person, and until the committing of the grievances by the said defendant as hereinafter set forth, was always reputed, esteemed and accepted by and among all his neighbors, and residents to whom he was in anywise known, to be a person of good name, fame, credit and reputation.

8. That the said plaintiff has not ever been guilty of or until the time of the utterance of the several false, scandalous, malicious and defamatory words by the said defendant, as hereinafter mentioned, been suspected to have been guilty of such matters as is hereinafter referred to. [7]

9. That on the 28th day of August, 1948, plaintiff appeared with other taxpayers in the office of the defendant to discuss the payment under protest of several taxpayers but that during the course of the conversation, and intending to injure the plaintiff, the said defendant did falsely and maliciously in the presence and hearing of other persons, utter the following false and defamatory matter concerning the plaintiff;

“Veatch—I don’t mind telling you to your face, that you are nothing but a crook and trouble-maker, and that you are making a good shake down on the people that are fighting the tax—you would not be fighting the tax if you were not getting a rake off,”

or words to that effect; thereby meaning and implying that plaintiff was and is cheating taxpayers in the federal areas, for whom he has been acting as agent; and that said persons in whose hearing said defamatory words were so spoken by defendant then and there understood that such was the meaning of said words.

10. That as a result of the utterance of the said false, and defamatory matter plaintiff has suffered public hatred, shame, contempt and ridicule, and has been injured in the sum of Fifty Thousand Dollars (\$50,000.00).

11. Plaintiff further states that such utterance was wilfully, deliberately and maliciously made and with the intent and purpose of intimidating the plaintiff into abandoning his pending case wherein the constitutionality of the tax law, as aforesaid, is involved, and that by reason thereof, plaintiff is entitled to punitive damages in the premises. [8]

Wherefore, plaintiff prays for judgment against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) as general damages; and the further sum of Fifty Thousand Dollars (\$50,000.00) as and for punitive or exemplary damages.

Dated at Honolulu, T. H., this 30th day of August, 1948.

/s/ VICTOR J. VEATCH,
Plaintiff.

/s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

Territory of Hawaii,
City and County of Honolulu—ss.

Victor J. Veatch, being first duly sworn on oath, deposes and says: That he is the plaintiff named in the foregoing Complaint, that he has read the same; knows the contents thereof, and that the same is true in substance and in fact.

/s/ VICTOR J. VEATCH.

Subscribed and sworn to before me this 30th day of August, 1948.

(Seal) /s/ ROSE I. PAVAO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires January 22, 1951.

[Endorsed]: Filed Sept. 4, 1948. [9]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Hyman M. Greenstein, plaintiff's attorney, whose address is 501 Merchandise Mart Building, Honolulu, T. H., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal) /s/ WM. F. THOMPSON, JR.,
Clerk of Court.

Date: September 4, 1948. [10]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 4th day of September, 1948, I received the within summons and on the 28th day of October at 9:30 a.m. of said date, I executed the same by handing to and leaving with William Borthwick at his office at the Territorial Tax Office, Honolulu, T. H., a certified copy of Summons, together with a copy of the Complaint attached thereto.

Marshal's Fees: Travel, \$.06; Service, \$2.00; Total \$2.06.

/s/ OTTO F. HEINE,
United States Marshal.

[Title of District Court and Cause.]

MOTION TO DISMISS

To the Honorable the Presiding Judge of the Above Court:

Comes now William Borthwick, defendant in the above-entitled cause, by Smith, Wild, Beebe & Cades, his attorneys, and moves the court as follows:

1. To dismiss this action on the ground that there has been a failure by the plaintiff in his complaint to state a claim upon which relief can be granted;

2. In compliance with Rule 2(a) (2) of the Rules of Civil Procedure for the United States District Court for the District of Hawaii, there is attached hereto and made a part hereof, citations of authorities in support of this motion.

Wherefore the defendant prays that the plaintiff's suit be dismissed.

Dated: Honolulu, T. H., December 20, 1948.

WILLIAM BORTHWICK,
Defendant,

By SMITH, WILD, BEEBE &
CADES,

By /s/ J. EDWARD COLLINS,
His Attorneys. [12]

CITATIONS

In an action of slander, no recovery may be had without proof of special damages in the absence of alleged language on the part of the defendant im-

puting to the plaintiff: (1) the commission of a crime; (2) a loathsome disease; (3) defamation with respect to the conduct of a business, trade, or office; or (4) unchastity. The complaint fails to meet any of these requirements, and, therefore, does not set out a crime upon which relief can be granted.

Hofstadter v. Bienstock, 208 N.Y. Supp. 453;
(1925);

Gaare v. Melbostad, 242 N.W. 466; (1932);

Fausett v. Clark (1878) 48 Md. 494; 30 Am. Rep.
48;

Morrisette v. Beatte, (1941 R. I.), 17 Atl. (2d)
464;

Nelson v. Rosenberg (1938 Neb.), 280 N.W. 229;
Farley v. Bufkin, (1931 Miss.), 132 So. 86;

Ringgold v. Land (1937 N.Car.), 193 S.E. 267;

Boyle v. MacDougall, 218 N.Y. Supp. 285;
(1926);

Eisenberg v. Reasenberg, 231 N.Y. Supp. 49;
(1928);

[Endorsed]: Filed Dec. 20, 1948. [13]

In the United States District Court for the
Territory of Hawaii

Civil No. 871

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

DECREE DISMISSING COMPLAINT

It appearing this 11th day of January, 1949, that the motion of the defendant above named to dismiss the complaint herein on the ground that it failed to set forth a cause of action upon which relief could be granted came on for hearing and was argued by counsel on the 29th day of December, 1948, and said motion to dismiss was granted with leave to the plaintiff to amend the complaint within ten days thereafter, and the plaintiff not having within ten days thereafter amended the aforesaid complaint;

It Is Hereby Ordered, Adjudged and Decreed that said complaint herein be and the same is hereby dismissed with prejudice.

Dated: Honolulu, T. H., this 11th day of January, 1949.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the
Territory of Hawaii.

[Endorsed]: Filed Jan. 11, 1949. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Pursuant to Rule 73 of the Rules of Civil Procedure, notice is hereby given that Victor J. Veatch, plaintiff above named, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree entered on the 11th day of January, 1949, in the above-entitled cause and action dismissing the complaint filed herein on the ground that said complaint fails to set forth a cause of action upon which relief can be granted.

Dated at Honolulu, T. H., this 14th day of January, 1949.

/s/ HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Plaintiff-Appellant. [17]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Victor J. Veatch, as principal and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto William Borthwick, defendant, in the sum of \$250.00 for the payment of which well and truly to be made, said Victor J. Veatch as principal and United States Fidelity and Guaranty Company, as surety, do bind

themselves, their respective heirs, executors, administrators, successors and assigns, jointly and severally, and firmly by these presents.

The Condition of This Obligation Is Such That:

Whereas the above bounden principal, Victor J. Veatch, has filed his notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered in the above-entitled cause dismissing said action:

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if he fails to [18] sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, said Victor J. Veatch has hereunto set his hand, this 14th day of January, 1949.

/s/ VICTOR J. VEATCH,
Principal.

UNITED STATES FIDELITY
AND GUARANTY CO.,

By CALVERT G. CHIPCHASE,
Surety, Its Attorney-in-fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 14th day of January, 1949, before me personally appeared Victor J. Veatch, to me known to be the person described in and who executed the

foregoing instrument, and acknowledged that he executed the same as his free act and deed.

(Seal) /s/ ROSE I. PAVAO,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires January 22, 1951.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 14th day of January, 1949, before me personally appeared Calvert G. Chipchase, to me personally known, who being by me duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 29th day of January, 1948, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors and said Calvert G. Chipchase acknowledged said instrument to be the free act and deed of said corporation.

 /s/ WILLIAM B. STEVEN,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [19]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON
APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney Hyman M. Greenstein, does hereby designate the following portions of the record to be contained in the record on appeal:

1. Complaint and Summons;
2. Defendant's motion to dismiss, dated December 20, 1948;
3. Decree dismissing complaint;
4. Notice of appeal;
5. Bond for costs on appeal;
6. Designation of the record on appeal;
7. Statement of points on appeal.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Jan. 17, 1949. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following statement of points on which he intends to rely on the appeal: The trial court erred in dismissing the complaint on the ground that it failed to set forth a cause of action upon which relief could be granted.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Jan. 17, 1949. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing pages numbered 1 to 22, inclusive, are a true and complete transcript of the record and proceedings had in said court in the

above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$. and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February, 1949.

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii. [23]

[Endorsed]: No. 12190. United States Court of Appeals for the Ninth Circuit. Victor J. Veatch, Appellant, vs. William Borthwick, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii.

Filed February 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12190

VICTOR J. VEATCH,

Plaintiff,

vs.

WILLIAM BORTHWICK,

Defendant.

DESIGNATION OF THE RECORD ON
APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following portions of the record to be contained in the record on appeal:

1. Complaint and Summons;
2. Defendant's motion to dismiss, dated December 20, 1948.
3. Decree dismissing complaint;
4. Notice of appeal;
5. Bond for costs on appeal;
6. Designation of the record on appeal;
7. Statement of points on appeal.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

STATEMENT OF POINTS ON APPEAL

Comes now Victor J. Veatch, plaintiff-appellant, in the above-entitled matter, by and through his attorney, Hyman M. Greenstein, does hereby designate the following statement of points on which he intends to rely on the appeal: The trial court erred in dismissing the complaint on the ground that it failed to set forth a cause of action upon which relief could be granted.

Dated at Honolulu, T. H., this 17th day of January, 1949.

VICTOR J. VEATCH,
Plaintiff,

By /s/ HYMAN M. GREENSTEIN,
His Attorney.

[Endorsed]: Filed Apr. 1, 1949. Paul P. O'Brien,
Clerk.

